No. 79-278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

LAWRENCE CONNELL, CHAIRMAN OF THE NATIONAL CREDIT UNION ADMINISTRATION BOARD, ET AL.,
Petitioners,

v.

AMERICAN BANKERS ASSOCIATION, ET AL.,

FEDERAL HOME LOAN BANK BOARD, ET AL.,
Petitioners,

v.

INDEPENDENT BANKERS ASSOCIATION OF AMERICA,

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.,
Petitioners,

v.

UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS IN OPPOSITION

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The respondent United States League of Savings Associations respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit in the case of *United States League of Savings Associations v. Board of Governors of the Federal Reserve System, et al.* The judgment, which is unpublished, is reproduced as Appendix A to the petition.

The Federal Reserve Board and Federal Deposit Insurance Corporation regulations invalidated by the court of appeals in this case represented a fundamental reversal by those agencies of long-standing limitations on commercial banking practices in the United States. For the first time, each of the financial institutions regulated by these petitioners would have been permitted to allow individuals to maintain all of the funds upon which they normally drew checks in an interest-bearing savings account, and to draw upon those funds by writing checks on a zero-balance checking account, which would trigger an automatic transfer from the savings account to the checking account of amounts sufficient to cover the checks.

Authorization of such automatic funds transfer (AFT) schemes—historically considered illegal by these agencies—would have given commercial banks a powerful new weapon in their competition for savings customers with the savings and loan institutions represented by respondent, because savings and loan associations generally cannot offer checking accounts and (with limited exceptions) are not permitted to allow savings account holders to make withdrawals from their accounts by check.

As the court of appeals (and the district court) recognized, the hybrid AFT account created by these regulations is indistinguishable in any real sense from an interest-bearing checking account or a savings account upon which checks may be written (Petition App. A p. 3a; App. C p. 25a), each of which Congress expressly has forbidden.* Congress has declared (1) that interest is not to be paid on checking accounts "directly, or indirectly, by any device whatsoever . . ." (12 U.S.C. 371a) and (2) that in 43 of the 50 States, "no depository institution shall allow the owner of a deposit or account on which interest or dividends are paid to make withdrawals by negotiable or transferable instruments for the purpose of making transfers to third parties." (12 U.S.C. 1832).

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* Petitioners misleadingly assert (Petition p. 15 n.4) that Congress has approved AFT plans in the recently enacted Financial Institutions Regulatory and Interest Rate Control Act of 1978, 92 Stat. 3641. That is far from the truth. Petitioners made the same argument in the District Court, which concluded, after an examination of legislative history expressly addressing the legality of AFT plans, that the Act "cannot be viewed as in any way dispositive of the legal questions raised by AFT services." (Petition App. C p. 30a).

REASONS WHY THE WRIT SHOULD BE DENIED

Although the three cases the Solicitor General seeks to bring to this Court were decided by a common judgment in the court of appeals, they were not consolidated for any purpose in the proceedings below. Each involves different facts, different regulations and, ultimately different legal issues, requiring that they be separately viewed. That especially is true of the instant case which, unlike its companions, turns on the application of direct statutory prohibition that delimits the administrative authority of the petitioning agencies—and which is not to be "overridden in the view that Congress intended it to be ignored." *Leedom v. Kyne*, 358 U.S. 184, 189 (1958), quoting from *Texas & New Orleans R. Co. v. Railway Clerks*, 281 U.S. 548 (1930). Petitioners would have the Court so ignore the will of Congress in this case.

No one seriously disputes that petitioners' AFT regulations would effectively erase any practical difference between checking accounts and savings accounts. As the court of appeals held, AFT accounts would, in effect, constitute either interest-bearing checking accounts or savings accounts upon which checks could be written—each of which in its overt form is unlawful. The court of appeals found the AFT regulations to be an "indirect device" for the payment of interest on demand deposits in violation of the long-standing congressional proscription against the payment of interest on such deposits "directly, or indirectly by any device whatsoever . . ."—a conclusion by the court that would seem dictated by its obligation to give clear and unambiguous statutory language full effect in accordance

with its meaning, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978), *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976), and its obligation to assure that administrative regulations do not create a rule out of harmony with the statute they are intended to implement, *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936). On the other hand, protestations that AFT plans preserve the formalities of two accounts and a reserved right to notice of withdrawal (see Petition pp. 13-15) could save petitioners' regulations only if the language of the statute relied upon by the court of appeals is assiduously ignored.

Even if it could be said that the 30-day notice provision of petitioners' regulations serves to distinguish AFT accounts in some significant respect from interest-bearing demand deposits, it does not save them from violation of 12 U.S.C. 1832, which prohibits withdrawals by negotiable instrument from savings deposits. Savings deposits always are, and always have been, subject to the 30-day notice requirement.

That the court of appeals disregarded the formal trappings of AFT plans and judged their legality on the basis of their substance and the realities of their operation is not remarkable. This Court took the same approach under analogous circumstances in *First National Bank in Plant City v. Dickenson*, 396 U.S. 122, 137 (1969), as did the District of Columbia Circuit in *Independent Bankers Ass'n v. Smith*, 175 U.S. App. D.C. 184, 534 F.2d 921 (1976), *cert. denied*, 429 U.S. 862 (1976).

In adopting the regulations at issue in this case, the Federal Reserve Board and the FDIC stretched their statutory authority beyond the breaking point. The

authority by which petitioners claim to have acted in this case was granted them by Congress with the intention that a meaningful distinction be maintained between demand deposits and savings deposits. See 1936 Fed. Res. Bull. 191; *Regulation Q NOW Accounts: Hearings on H.R. 4070, H.R. 4719 and H.R. 4988 Before the Subcomm. on Bank Supervision and Insurance of the House Comm. on Banking and Currency*, 93rd Cong., 1st Sess. 240 (1973). As the court of appeals recognized (Petition App. A pp. 4a-6a), if these distinctions and the public policy they embody have outlived their usefulness, the task of changing them falls to Congress, not the courts.*

* In response to the court of appeals' ruling three bills were introduced in Congress that would, *inter alia*, grant petitioners the authority to permit commercial banks to offer AFT plans. H.R. 4986 (formerly H.R. 3864), 96th Cong., 1st Sess. (1979); H.R. 4305, 96th Cong., 1st Sess. (1979); S. 1347, 96th Cong., 1st Sess. (1979). The House passed H.R. 4986 on September 11, 1979. The comments of Rep. St. Germain (Chairman of the Financial Institutions Subcommittee of the House Banking Committee) and Rep. Annunzio (Chairman of the Consumer Affairs Subcommittee of the House Banking Committee) in introducing their bills (H.R. 3864 and H.R. 4305, respectively) are worth noting:

> Mr. St. Germain: "Faced with outmoded restrictions, banks, thrift institutions, and regulators have been forced to come up with a variety of gimmicks as thinly disguised efforts to circumvent statutory hobbles surrounding checking accounts. The court has now ruled these complex sets of gimmicks illegal and has clearly suggested that the Congress set a policy on checking accounts and interest payments on such accounts." 125 Cong. Rec. H2506 (daily ed. May 1, 1979)
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> Mr. Annunzio: "I do not quarrel with the court's decision because, quite frankly, I think the court was totally correct in its findings, and in fact, I had suggested when the automatic transfer services were first suggested by the Federal Reserve Board that such new powers were clearly illegal. I pointed out at that time that this action marked another attempt by a Federal agency to legislate on its own." 125 Cong. Rec. H4075 (daily ed. June 5, 1979).

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari in the case of *United States League of Savings Associations v. The Board of Governors of the Federal Reserve System, et al.* should be denied.

Respectfully submitted,

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